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IN THE

United States Supreme Court

OCTOBER TERM, 1978.

No. 78-576

AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO,
Petitioner,

vs.

WINN-DIXIE STORES, INC.,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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INDEX

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statutes Involved	2
Statement of the Case	3
Reasons for Denying the Writ	6
Conclusion	13

CITATIONS

Cases	*Pages*
Central Hardware co. v. NLRB, 407 U. S. 539 (1972)	8
Dura Corp v. NLRB 380 F. 2d 970 (6th Cir. 1970)	12
NLRB v. Florida Citrus Canners, 369 U. S. 404 (1962)	11
NLRB v. Food Store Employees Local 347 (Heck's Inc.), 417 U. S. 1 (1974)	11
NLRB v. Getlan Iron Works, Inc., 377 F. 2nd 894 (2nd Cir. 1967)	11
NLRB v. United Insurance Co., 390 U. S. 254 (1960)	7
Toledo Scale Co. v. Computing Scale Co., 261 U. S. 399 (1923)	12
Universal Camera Corp. v. NLRB, 340 U. S. 474 (1951)	8

Statutes

	Pages
28 USC § 1254	2
28 USC § 2101	12
29 USC § 158	5, 6, 7
29 USC § 160	6, 7, 8

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Winn-Dixie Stores, Inc. respectfully opposes issue of a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on July 5, 1978.

OPINIONS BELOW.

The Court of Appeals initial opinion, dated February 17, 1978 is reported at 567 F. 2d 1343. On June 26, 1978 the Court of Appeals issued an amendatory opinion which is reported at 575 F. 2d 1107. The decision and order of the National Labor Re-

lations Board are reported at 224 NLRB 1418 (1976). The opinions are reproduced in the Petition for a Writ of Certiorari (Apps. A, B and C).

JURISDICTION.

Petitioner seeks to invoke this Court's jurisdiction under 28 USC § 1254(1). The judgment of the United States Court of Appeals for the Fifth Circuit was entered on July 5, 1978. Petitioner's timely petition for rehearing and suggestion for rehearing en banc was denied on June 26, 1978.

QUESTIONS PRESENTED.

1. Whether the Court of Appeals erred in reversing the finding of the National Labor Relations Board that the Winn-Dixie profit-sharing plan mandated the illegal forfeiture of bargaining unit employee accounts; and

2. Whether the Court of Appeals erred when it refused to enforce the order of the National Labor Relations Board to Winn-Dixie, Inc. to restore the forfeited profit-sharing accounts of bargaining unit employees; and

3. Whether petition for Writ of Certiorari should be dismissed due to Petitioner's failure to timely file with this Court.

STATUTES INVOLVED.

The relevant statutory provisions are cited and reproduced in the Petition (pp. 2-3).

STATEMENT OF THE CASE.

Since 1946, Winn-Dixie Stores, Inc. (hereinafter "the Company") has maintained a profit-sharing plan, whereby eligible employees are permitted to share in the profits of the Company. The plan is funded through annual contributions by the Company of a percentage of profits made to separate employee accounts on a prorata basis. Under normal circumstances employees or their heirs become entitled to payment from their accounts upon retirement, death, or termination. However, the employees generally have no immediate vested interest in their accounts. Benefits are intended to be paid in deferred, periodic form except for an annual cash payment up to $300 to employees earning less than $8,500 per year. All bargaining unit employees during the relevant period earned less than this amount (A.-7, 84, 85 General Counsel Exhibit 19.)[1]

Until it was amended in 1971 the profit-sharing plan contained a provision, Article II, Section 2.4(b), which excluded from participation therein:

> "Emloyees who, as a result of collective bargaining, have entered into a written agreement with Employer by which Employer agrees to contribute funds for the benefit of such employees to some other form of Pension or Retirement Program" (other than 'Program' herein). (General Counsel Exhibit 19) Art. II, § 2.4(b).

In August 1969 when collective bargaining negotations commenced for the second contract the Union's proposals included a demand for employee

[1] All references are to Appendix filed by the parties in the Court of Appeals.

participation in both the Company's plan and a Union pension plan. The Company's position on this point was that coverage by both its profit-sharing plan and the Union sponsored system constituted dual coverage which was not a mandatory subject of collective bargaining. (A. 79) In November 1969 the Company reached agreement with the Teamsters for a collective bargaining contract covering the Company's New Orleans warehouse. Prior to this time the instant parties had been bargaining on a provision-by-provision basis but following the New Orleans negotiations, the Company offered the Union the New Orleans contract if it was willing to take it *in toto*. That contract provided for coverage under a pension plan and for forfeiture of any existing accounts under the Company's profit-sharing plan. After some discussion the Union agreed to accept the entire New Orleans contract (A. 81).

Throughout these negotiations the Company maintained its osition that unit employee participation in both the Union pension plan and the Company profit-sharing plan would constitute dual coverage and for this reason the Company refused to bargain over profit-sharing participation. The Administrative Law Judge agreed with the Company and found no violation in the existence of § 2.4(b) or in the Company's refusal to bargain over profit-sharing participation. (A. 88). The Board reversed the ALJ on the grounds that the Company profit-sharing plan and the Union pension plan were not sufficiently similar such that participation in both would constitute dual coverage. 224 NLRB at 1419.

The Board decision focused primarily upon the conduct of the Company at the bargaining table and

held that the Company's refusal to bargain over profit-sharing participation violated § 8(a)(5) and (1) of the Act. The Board further held that the Company's insistence that unit employees forfeit their existing profit-sharing accounts violated § 8(a)(5) and (1) and that the Company's actual forfeiture of these accounts violated § 8(a)(3). As a final point, the Board held that the very existence of the exclusionary language in § 2.4(b) violated § 8(a)(3) of the Act. 224 NLRB at 1419.

On petitions to review and cross-application to enforce the Board's order, the Court of Appeals held that "the existence of clause 2.4(b) violated § 8(a)(3) of the Act and that the Company's refusal to bargain over coverage under both plans violated §§ 8(a)(5) and (1). 567 F. 2d at 1348. However, the court concluded that the Company had not violated the Act when unit employees were excluded from the profit-sharing plan and their accounts were forfeited pursuant to a collective agreement to which the Union had agreed and, respecting the wage provision, it had endorsed. *Id.*

In its amendatory opinion the Court of Appeals misconstrued the Board's order and held that the Board had concluded that § 2.4(b) illegally mandated forfeiture of existing profit-sharing accounts. 575 F. 2d at 1109. The Court then stated that it could not sustain this position because "the record does not present substantial evidence . . . that the provisions of the plan mandated forfeiture of existing accounts or that the company violated its duty to bargain by insisting on forfeiture." *Id.*

REASONS FOR DENYING THE WRIT.

1. The Union first seeks certiorari upon the ground that the Court of Appeals exceeded the proper scope of its review of a Board decision under § 10(e) of the National Labor Relations Act (hereinafter "the Act"). Specifically, the Union objects to the court's decision reversing the Board determination that § 2.4(b) of the Company profit-sharing plan mandated the illegal forfeiture of profit-sharing accounts of employees covered under the Union pension plan. It is the Union's position that in reaching this decision the Court of Appeals improperly substituted its own findings in place of a Board factual determination which was supported by substantial evidence in the record considered as a whole. However, the Union's objections on this point are misplaced inasmuch as the Board decision did not conclude that § 2.4(b) mandated forfeiture.

Examination of the Board's decision indicates that the forfeiture effect of the language of § 2.4(b) was never addressed by the Board. It was clearly the Board's position that the Company acted improperly at the bargaining table when it refused to bargain over unit participation in the profit-sharing plan and when it insisted that all employees covered by the union pension plan forfeit their profit-sharing accounts. The Board found an additional violation of the duty to bargain when the Company actually forfeited the accounts. 224 NLRB at 1419. However, the only consideration given to the language itself of § 2.4(b) resulted in a finding that the *exclusionary* purpose of the clause violated § 8(a)(3). *Id.* At no point did the Board conclude that § 2.4(b) mandated illegal forfeiture.

The initial opinion of the Court of Appeals also focused upon the Company's bargaining table conduct, affirming the Board decision that refusal to bargain over profit-sharing participation violated § 8(a)(5) and (1) of the Act and that the Company's insistence upon forfeiture and the actual forfeiture itself also violated the Act. 567 F. 2d at 1347. Additionally, the court affirmed the Board's finding that the exclusionary purpose of § 2.4(b) violated § 8(a)(3) but nowhere does the court conclude that § 2.4(b) mandates forfeiture. Regretably, the amendatory opinion of the Court of Appeals misconstrued the Board's decision and confused this point. The court amended its earlier decision with, *inter alia,* the following: "The Board found that the company plan mandated . . . that employees covered under a union pension plan must forfeit any account they already have under the company plan." 575 F. 2d at 1109. The amendatory opinion then reverses this erroneous interpretation of the Board decision. *Id.* Nevertheless it is clear that the Union is incorrect when it contends that the Court of Appeals improperly reversed a Board finding supported by substantial evidence; the Board simply did not find that § 2.4(b) mandated forfeiture.

However, assuming, *arguendo,* that the Board decision could be construed to address the forfeiture effect of § 2.4(b), the Union's claim that it was improperly reversed is without merit. This is due to the Union's misinterpretation of the proper scope of court review under § 10(e) and to its failure to recognize the significance of a substantial portion of the record.

The Union's brief cites *NLRB v. United Insurance Co.,* 390 U. S. 254 (1960) in support of the proposi-

tion that the Board alone may chose between two "fairly conflicting views" concerning a question of fact and that the Board's choice becomes absolutely binding upon the court if it is supported by substantial evidence. The Union finds further support for this position in *Universal Camera Corp. v. NLRB*, 340 U. S. 474 (1951) where it is stated that the courts must adopt Board factual determinations even as to matters not uniquely requiring the Board's expertise. In short, the Union in effect contends that § 10(e) insulates Board decisions from all review.

In taking this position the Union overlooks the very language of § 10(e) itself, that Board findings shall be accorded respect only if supported by substantial evidence in the record considered as a whole. The clear meaning of this provision is that the Court of Appeals must examine the record and make its own determination as to the sufficiency of the Board's findings. *Central Hardware Co., v. NLRB*, 407 U. S. 539 (1972). This court summarized this position in *Universal Camera* when it observed that:

> "The Board's findings are entitled to respect; but they must nonetheless be set aside when the record before a Court of Appeals clearly precludes the Board's decision from being justified by a fair estimate of the worth of the testimony of witnesses or of its informed judgment on matters within its special confidence, or both . . ." *Id.* at 490.

In this light, the critical question is whether the alleged Board finding that § 2.4(b) of the Company profit-sharing plan mandated foreiture is in fact supported by substantial evidence. The Union claims in its brief that "[t]he plain meaning of the exclusionary clause contained in Section 2.4(b) . . . compelled the

finding reached by the Board that coverage under a collectively bargained pension plan resulted in a forfeiture of employees' profit-sharing accounts." However, no authority has been cited for this equation of exclusion of future accounts with forfeiture of present accounts.

Conversely, as the Court of Appeals' amendatory opinion indicates, a four-corners reading of the Company profit-sharing document reveals that the plan does indeed contain explicit forfeiture provisions, but that these apply to employees who leave the service of the Company. In short, the substantial portion of the evidence in the record actually contradicts the Union's position that Section 2.4(b) mandates forfeiture. Hence, it can hardly be said that a fair estimate of the totality of the record would preclude the Court of Appeals from considering this evidence and reversing the Board's finding that Section 2.4(b) "plainly" mandates forfeiture when clearly it does not plainly do so.

2. The union also seeks Certiorari upon the ground that the Court of Appeals exceeded the proper scope of its review when it reversed the Board's "make-whole" order. Specifically, the Union charges that the Court of Appeals acted improperly when it refused to enforce the Board's directive to the Company to restore the forfeited accounts of unit employees in the Company profit-sharing plan. It is the Company's position that the scope of the court's review was legally proper and that the appropriateness of the Board's remedy in this case was not supported by substantial evidence.

In its decision, the Board found that the Company had committed an unfair labor practice when

in 1970 it refused to bargain over unit employee participation in the Company profit-sharing plan. To remedy this conduct, the Company was ordered to reimburse unit employees for their forfeited profit-sharing accounts. According to the Board, the purpose of this directive was to restore "the *status quo ante*, making the employees whole for the losses that they have suffered . . ." It is this statement of purpose which highlights the principle flaw in the Board order and the court's justification for refusing enforcement. To require the Company to restore unit employee's profit-sharing accounts would provide employees with participation in two plans, the profit-sharing plan and the union pension plan. However, it cannot be said that this dual participation was the unit employees' status prior to 1970 or that the employees had even a reasonable expectation of dual coverage throughout the 1970 negotiations.

During the 1970 negotiations the Union demonstrated its willingness to exchange profit-sharing participation for a more favorable wage settlement and it did in fact make this exchange. In short, it cannot be said that restoration of accounts is now necessary to make the employees whole for the speculative loss of a provision clearly deemed expendable by the Union. This was the position the Court of Appeals when it observed that "we cannot enforce a so-called 'compensatory' remedy when there is no way to identify or quantify in real — world terms the harm suffered by the employees." 575 F. 2d at 1110.

The Union brief criticizes this decision of the Court of Appeals that the remedy is to speculative on the grounds that "the losses can be calculated to the

penny." The company does not deny this but points out that the Court was not speaking strictly of computation when it declared the Board remedy to be too speculative. Instead, the principal concrn of the court was that the remedy is speculative if it cannot be said with any certainty that profit-sharing and pension participation would have been elements of the 1970 contract, particularly in view of the Union's willingness to sacrifice profit-sharing for wages.

Generally, where a Court of Appeals is called upon to enforce a Board remedial order its standard of review is once again whether the order is justifiable considering substantial evidence in the record as a whole. *NLRB v. Florida Citrus Canners*, 369 U. S. 404 (1962). However, in determining substantiality of evidence, the court must consider any aspect of the record which detracts from the weight of such evidence. *NLRB v. Getlan Iron Works, Inc.*, 377 F. 2d 894, 898 (2nd Cir. 1967). It is the Company's position that the indications in the record that the union deemed profit - sharing participation expendable clearly detracts from the appropriateness of the Board's dual coverage order.

The Union is quite correct that Board orders may be overturned by a Court of Appeals only in the instance of crystal clear error or abuse of discretion. *See NLRB v. Food Store Employees Local 347 (Heck's Inc.)*, 417 U. S. 1 (1974). However, nothing could be more patently erroneous than a Board order specifying its purpose to reinstate a previous, nonexistant status quo. This is the crytal clear error in the Board order and the justification of the Court of Appeals for refusing to enforce it.

As a final point, the union claims a conflict between the decision of the Court of Appeals in the present case and the decision of the Sixth Circuit in *Dura Corp. v. N.L.R.B.*, 380 F. 2d 970 (6th Cir. 1967). However, close examination of the facts in *Dura* indicates that this case is not dispositive of the present issue. It is correct that in *Dura* the Sixth Circuit affirmed a board order directing reintatement of previously forfeited profit-sharing accounts. Nevertheless, the bargaining history between those parties showed that the employer had agreed to a Union pension plan which the Union then rejected when the employer refused to discuss profit-sharing participation. The net result was no plan at all for the employees. Thus, by ordering restoration of profit-sharing participation the Sixth Circuit directed the employer to provide for a quantum of coverage to which the employer had already agreed — one plan. Conversely, in the present case the Board order effectively granted the employees plan coverage at twice the amount that the record showed the company was willing to provide. As the Court of Appeals observed, the Board order in the present case directed the creation of a "status novus".

3. As provided in 28 USC § 2101(c), a party seeking a Writ of Certiorari to a Court of Appeals in a civil case has 90 days in which to file from the date of entry of the judgment in the lower court. Failure to timely file deprives this court of jurisdiction to review on certiorari the merits of the judgment. *Toledo Scale Co. v. Computing Scale Co.*, 261 U. S. 399 (1923). In this case the judgment upon rehearing was entered July 5, 1978. From that date the 90 day filing period expired on October 3, 1978. The notice of

petition in the present case indicates that Petitioner filed with this Court on October 6, 1978.

CONCLUSION

For these reasons the Company respectfully submits that the Court of Appeals did not improperly reverse any element of the Board's decision in this case. Additionally, the Company submits that Petitioner has failed to timely file its petition. Accordingly, the petition for a Writ of Certiorari should be denied.

Respectfully submitted this 3rd day of November, 1978.

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